In the High Court of Punjab and Haryana at Chandigarh

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Civil Revision No.2350 of 2002(O&M)

.....

Date of decision:9.2.2007

Brij Mohan Aggarwal

.....Petitioner

v.

Ramesh Chand LR of Durga Pershad

.....Respondent

....

Present: Mr. R.K. Jain, Advocate for the petitioner.

Mr. Arvind Rajotia, Advocate for the respondent.

.....

S.S. Saron, J.

The petitioner, who is the plaintiff decree holder (`DH' – for short) has filed this revision petition assailing the order dated 13.8.2001 passed by the learned Additional Civil Judge (Senior Division), Hisar whereby his application under Order 34, Rule 10-A read with Sections 2 (12) and 151 and other sections of the Code of Civil Procedure (`CPC' – for short) for the grant of mesne profits has been dismissed.

The DH filed a civil suit for possession by way of redemption of mortgage on 11.12.1984 before the Civil Judge (Senior Division), Hisar. The suit property consisted of a residential house as detailed in the registered mortgage deed No.449 dated 21.12.1954 situated at Chetan Street (Mohalla), Hansi City (Town), District Hisar. The suit filed by the DH was

dismissed by the trial Court on 1.2.1989. Against the said judgment and decree, the DH filed an appeal before the first appellate Court which was dismissed on 3.9.1993. Aggrieved against the same the DH preferred Regular Second Appeal (RSA) No.1733 of 1994 in this Court. The second appeal filed by the DH was allowed on 11.10.1995. This court after setting aside the orders dated 1.2.1989 and 3.9.1993 passed by the Courts below remanded the case to the trial Court. The learned trial Court thereafter on 13.5.1998 decreed the suit of the DH with costs after passing a preliminary decree. After the passing of the decree by the trial Court, the DH deposited the mortgage amount of Rs.13,968/- on 20.5.1998. The appeal filed by the defendant-respondent-Judgment Debtor (`JD' – for short) against the decree of the trial Court dated 13.5.1998 was dismissed by the first appellate Court on 9.6.1999. The JD preferred RSA No.3139 of 1999 in this Court against the judgment and decree of the first appellate Court dated 9.6.1999 which was dismissed by this Court on 4.2.2000. In execution of the decree, the DH was given the possession of the suit property on 11.6.2003. The application filed by the DH is for the grant of mesne profits for the period the house has been in unauthorized occupation of the JD. The said application has been dismissed by the executing Court vide its impugned order dated 13.8.2001. It was observed that the trial court in its judgment dated 13.5.1998 had observed that there was a specific issue i.e. Issue No.13 to the effect as to whether the plaintiff-DH is entitled to recover the mesne profits and if so, how much. The said issue was decided against the DH. It was observed that the question of mesne profits having been finally settled between the parties, the application for the same relief would not be

maintainable. Besides, filing of the same is a blatant misuse of the process of the Court. Aggrieved against the said order dated 13.8.2001 passed by the trial Court the DH has filed the present petition

Shri R.K. Jain, Advocate learned counsel for the petitioner has submitted that the trial Court in its judgment and decree dated 13.5.1998 had declined mesne profits in relation to the period which was claimed in the suit. It is, however, submitted that after the suit of the DH had been finally decreed in his favour with the dismissal of RSA No.3139 of 1999 on 4.2.2000, there was absolutely no justifiable cause for the JD to continue in possession which was given to the DH on 11.6.2003. Therefore, Shri Jain during the course of hearing confines his claim for the grant of mesne profits to the DH for the period from the date of dismissal of RSA No.3139 of 1999 by this Court on 4.2.2000 till the date of taking possession on 11.6.2003. It is submitted that for this period there being absolutely no justifiable cause for the JD to continue in possession, the DH is entitled to mesne profits.

In response, Shri Arvind Rajotia, Advocate learned counsel for the JD has submitted that the application filed by the DH under Rule 10-A of Order 34 CPC is not maintainable as the demand of mesne profits from a mortgagee can be claimed by a mortgagor in a suit for foreclosure and the present suit had been filed for redemption of mortgage. Therefore, it is submitted that the application filed by the DH as also the present petition are absolutely misconceived. It is further submitted that a suit for foreclosure would mean a suit where a mortgagor has been shut out or excluded and barred of seeking the equity of redemption of mortgage. In

any case, it is submitted that the learned trial Court had in para 18 of its judgment dated 13.5.1998 declined the relief of mesne profits which cannot now be claimed in execution. Shri R.K. Jain, however, has submitted that even if the DH is not entitled to mesne profits under Rule 10-A of Order 34 CPC, he would be entitled to the same under other provisions of the CPC. A reference has been made to Section 2(12) and Order 20 Rule 12 which, it is contended, are applicable and would apply even to execution proceedings by virtue of Section 141 CPC.

I have given my thoughtful consideration to the contentions of the learned counsel appearing for the parties. It is not in dispute that the suit filed by the DH for seeking redemption of the residential house as described in registered mortgage deed No.449 dated 21.12.1954 was decreed in his favour by the trial Court on 13.5.1998. The appeal against the same was dismissed by the first appellate Court on 9.6.1999 and thereafter RSA No.3139 of 1999 of the JD was dismissed by this Court on 4.2.2000. After the passing of the decree by the trial Court on 13.5.1998, the DH also deposited the mortgage amount of Rs.13,968/- in Court.

Learned counsel appearing for the respondent has not given any justifiable reason or ground for continuing in possession and not giving the possession of the suit land to the decree holder after the dismissal of RSA No.3139 of 1999 by this Court on 4.2.2000 till 11.6.2003. This is more so for the reason that the amount of mortgage had already been deposited in Court on 20.5.1998. Therefore, Mr. Jain is right in his contention that after the dismissal of RSA No.3139 of 1999 by this Court on 4.2.2000, the DH

would be entitled to mesne profits till possession was taken on 11.6.2003. Mesne profits has been defined in Section 2(12) of the CPC as follows:-

> "2(12) "*mesne profits*" of property means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but shall not include profits due to improvements made by the person in wrongful possession;"

The application filed by the DH for seeking mesne profits in terms of Order 34 Rule 10-A may not be maintainable as the same relates to power of Court to direct mortgagee to pay mesne profits where in a suit for foreclosure, the mortgagor has, before or at the time of the institution of the suit, tendered or deposited the sum due on the mortgage, or such sum as is not substantially deficient in the opinion of the Court, the Court shall direct the mortgagee to pay to the mortgagor *mesne profits* for the period beginning with the institution of the suit. The learned counsel has not been able to clearly state as to what is the difference between a redemption suit and a suit for foreclosure. He has, however, referred to the Law Lexicon which defines Foreclose, Foreclosed and Foreclosure as under:-

> "**Foreclose.** To debar a mortgagor from his right to redeem a mortgage.
>
> **Foreclosed.** Shut out or excluded; as the barring of the equity of redemption on mortgages, etc. (Tomlin's Law Dic.)
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> **Foreclosure.** Foreclosure in theory, at least, is merely a decree determining the equitable right of a mortgagor to redeem after

the mortgagee's estate has become absolute at law. (See Bonham v. Newcomb. (1806) 1 Vern 232; 23 ER 435; Sampson v. Pattison, (1842) 1 Hare 533; 66 ER 1143; 58 RR 178; Carter v. Wake, (1877) 4 Ch D 605]. The term is also loosely applied to any of the various methods statutory or otherwise, known in different jurisdictions, of enforcing payment of the debt secured by a mortgagee, by taking and selling the mortgaged estate.

The expression "FORECLOSING A MORTGAGE" is sometimes used in a loose sense as referring to any such action on the part of the mortgagee as has the legal effect of definitely putting the mortgagor to the option of either paying the mortgage debt within a specified date or suffering his right of redemption to be extinguished 22 A 17 was cited as an instance of such a use of the word. [12 OC 314 (317).]

The action of foreclosing (S. 67, T.P.Act]."

A right as regards foreclosure or sale has been provided for by the provisions of Section 67 of the Transfer of Property Act, 1882 (TP Act – for short). The same is under the heading, "Rights and Liabilities of Mortgagee" wherein the rights of mortgagee as against mortgagor so far as the right to maintain a suit for foreclosure have been provided. It is envisaged therein that in the absence of contract to the contrary, the mortgagee has, at any time after the mortgage money has become due to him, and before a decree has been made for the redemption of the mortgaged property, or the mortgage money has been paid or deposited in the manner provided therein, a right to obtain from the Court a decree that

the mortgagor shall be absolutely debarred of his right to redeem the property. Admittedly, the suit filed by the DH was not one for foreclosure. Therefore, the provisions of Order 34 Rule 10-A CPC would not apply. However, that would not make any difference as the nomenclature under which an application is filed for grant of relief is not quite relevant and that does not debar the Court from exercising its jurisdiction which otherwise it possesses. The Court has the competence to award mesne profits and the power to award it will not become invalid merely because an application has been filed under a wrong provision. The necessary relief can be granted where it is shown to the Court that the same is permissible under other statutory provisions. Section 2(12) CPC which has been reproduced above defines "mesne profits" to mean those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom. The Mesne profits can also be granted in terms of Order 20 Rule 12 CPC, which reads as under:-

> "**12. Decree for possession and *mesne profits.*-** (1) Where a suit is for the recovery of possession of immovable property and for rent or mesne profits, the Court may pass a decree-
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> (a) for the possession of the property;
>
> (b) for the rents which have accrued on the property during the period prior to the institution of the suit or directing an inquiry as to such rent,
>
> (ba) for the mesne profits or directing an inquiry as to such mesne profits;]

(c)directing an inquiry as to rent or mesne profits from the institution of the suit until-

(i)the delivery of possession to the decree-holder,

(ii)the relinquishment of possession by the judgment-debtor with notice to the decree-holder through the Court, or

(iii)the expiration of three years from the date of the decree, whichever event first occurs."

Clause (c) of Rule 12(1) of Order 20 provides for the directing of an inquiry as to rent or mesne profits from the institution of the suit until the delivery of possession to the decree holder. The provisions of Order 20 Rule 12 CPC would apply to execution proceedings as well. Section 141 CPC deals with miscellaneous proceedings and it is provided that the procedure provided in the CPC in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction. The 'Explanation' therein envisages that the expression "proceedings" includes proceedings under Order 9, but does not include any proceedings under Article 226 of the Constitution. Therefore, if it is found that a person is in wrongful possession of property to which the DH was entitled to, the DH would certainly be entitled to mesne profits against the person in wrongful possession. In terms of Clause (c) of Order 20 Rule 12(1) CPC an inquiry is to be conducted from the date of wrongful possession of the JD till the delivery of possession by him. The fact that the trial Court vide its judgment and decree dated 13.5.1998 had declined mesne profits and, therefore, the Executing Court held that the DH would not be entitled to mesne profits is inconsequential as Shri Jain during the

course of hearing has confined his prayer for grant of mesne profits only for the period of possession by the JD after the dismissal of RSA No.3139 of 1999 on 4.2.2000 till the possession was given on 11.6.2003. Nothing has been placed on record by the respondent-JD to show that he was not in unauthorized possession and/or that in fact possession had been offered to the DH. In the circumstances, I am inclined to hold that the DH would be entitled for mesne profits. The mesne profits for the afore-referred period would, however, require holding of an inquiry by the executing Court as regards the rate of mesne profits.

In the circumstances, the revision petition is allowed and the order dated 13.8.2001 is set aside and it is held that the DH would be entitled for the grant of mesne profits for the period from 4.2.2000 till 11.6.2003. However, the rate of mesne profits would be required to be considered and determined by the Executing Court in accordance with law. The parties through their counsel shall appear before the executing Court on 23.4.2007. No costs.

February 9, 2007. **(S.S. Saron)**
Judge

hsp

NOTE: Whether to be referred to the Reporter or not:Yes